Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

WILLIAM FAZIO, an individual,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a local public entity, and ARLO SMITH, an individual,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

NANCY L. FINEMAN
Counsel of Record
JOSEPH W. COTCHETT
ELIZABETH M. O'CALLAHAN
COTCHETT, PITRE & SIMON
Attorneys for Petitioner
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
San Francisco, California 94010
(650) 697-6000

144568

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTION PRESENTED

Whether the job of Assistant District Attorney is a position for which party affiliation is an appropriate requirement for effective performance and, therefore, whether all Assistant District Attorneys may be terminated for the exercise of First Amendment rights without offense to the Constitution.

PARTIES TO THE PROCEEDING

The parties identified in the caption were the only parties to the proceedings below.

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Bill Fazio, an individual, the plaintiff in the District Court and the appellant in the Court of Appeals, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 125 F.3d 1328 (9th Cir. 1997), and is reprinted as Appendix A to this Petition. The Order of the United States District Court for the Northern District certifying for interlocutory appeal its order granting in part and denying in part defendants' Motion for Summary Judgment is not published and appears as Appendix B to this petition. The Order of the United States District Court for the Northern District granting in part and denying in part defendants' Motion for Summary Judgment is not published and appears as Appendix C to this Petition.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered an order denying a petition for rehearing and rejecting the suggestion for rehearing en banc on November 18, 1997. The order denying the petition for rehearing is reprinted as Appendix D to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The constitutional provisions and statutes involved are the First Amendment to the United States Constitution and 42 U.S.C. § 1983 which provide as follows:

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Over forty years ago, this Court told the nation: "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes

desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). It is for that reason that this Court directs that

> [v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employee's speech.

Rankin v. McPherson, 483 U.S. 378, 384 (1987).

The question in this case is whether the Constitution permits government employees and specifically in this case assistant district attorneys to be summarily terminated in retaliation for the exercise of First Amendment rights.

After twenty years of successful service as an assistant district attorney in the San Francisco, California District Attorney's Office, Petitioner Bill Fazio decided to run for District Attorney. On the day Fazio filed for candidacy, Arlo Smith, the incumbent and Fazio's boss, fired Fazio. The District Court upheld the firing as constitutional, finding that the position of Assistant District Attorney "is such that political affiliation and loyalty are appropriate requirements for effective performance" and thus an assistant district attorney may lawfully be terminated for the exercise of Constitutional rights. App. C at 27a. The Ninth Circuit, hearing petitioner's interlocutory appeal, affirmed the judgment of the District Court.

The Ninth Circuit's decision ignored the precedent of this Court which requires the application of the *Pickering* balancing test[1] for terminations of public employees that are based on the

1. *Pickering v. Board of Education*, 391 U.S. 563 (1968) held that where a state has an interest in regulating the speech of its employees, a balance must be struck between the interest of the state in promoting the efficiency of services, and the interest of the employee as a citizen in speaking out on matters of public concern. *Id.* at 568.

exercise of the right of free speech, and for terminations that are based on both the exercise of the right of free speech and on political affiliation. *O'Hare Truck Service, Inc. v. City of Northlake*, __U.S. __, 116 S. Ct. 2353 (1996). The decision of the Court of Appeals for the Ninth Circuit silences the political expression of all government attorneys, chilling free speech and hampering fair and open elections. Unless this Court reverses the Ninth Circuit, the public will not have the opportunity to elect the most qualified persons to be public servants. Instead, incumbent public officials will have the power to stifle the political expression of their employees and to suppress opposing political views.

The protections afforded by the First Amendment of the United States Constitution are the special province of this Court. There is nothing more appropriate for certiorari than a decision which significantly curtails the First Amendment freedoms of a particular class of persons, and by extension, the public at large. Due to the precedent set by the Opinion and its impact on plaintiff's case, as well as on all assistant district attorneys and the public, Fazio files this petition for certiorari. Because the decision of the Court of Appeal directly contravenes precedent established by this Court on an important question of Federal law, this Court should issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

A. Facts

1. Petitioner Bill Fazio

Bill Fazio was born and raised in San Francisco, California, and worked his way through college and law school in San Francisco. In 1975, Fazio joined the San Francisco District Attorney's office during the administration of John Ferdon, a Democrat. Like most assistant district attorneys, Fazio's early

career included misdemeanor trials, preliminary hearings, and trial of theft and assault crimes. Fazio was later promoted to narcotics, and subsequently rape and child abuse cases. Fazio is a Fellow of the American College of Trial Lawyers.

In 1979, respondent Arlo Smith, a Democrat, was elected District Attorney. Fazio continued in his role as an assistant district attorney, and in 1981, Fazio began prosecuting homicide cases. Smith was re-elected in subsequent elections. During Smith's administration until the time of his termination, Fazio handled over 250 homicide cases and 100 jury trials.

2. *Organization Of The San Francisco District Attorney's Office*

The San Francisco District Attorney's Office is headed by the elected District Attorney. At the time of the events in question, respondent Arlo Smith was the District Attorney. Smith's Policy Making Group in the office met regularly and comprised the Chief Assistant District Attorney, the Chief of the Criminal Division, the Chief of the Superior Court, the Head of the Municipal Court, and the Chief Trial Attorney. Fazio did not hold any of these positions and never attended any meetings of the Policy Making Group. CR 44-45.

The office was divided into different departments to prosecute different crimes. CR 42. Fazio was in the homicide division and was supervised by another assistant district attorney. CR 42. Fazio had very little contact with District Attorney Smith and rarely discussed his cases with him. CR 42. Fazio's job title was "Head Attorney." The title of Head Attorney does not have a single definition but instead may denote several things, including level of experience and skill, or degree of supervisory capacity. Fazio never held any policy-making or supervisory role, so his title indicated his standing as a skilled and experienced prosecutor

of many years. CR 45. Like other assistant district attorneys, Head Attorneys tried cases, and had job duties identical to all other assistant district attorneys. CR 44. Among the tasks associated with his job was making statements to the media regarding cases he handled that were of public interest.

3. The Termination Of Fazio And The November 1995 Election

In November 1995, District Attorney Arlo Smith faced re-election. Fazio decided to run against him. Two of Smith's confidantes approached Fazio and suggested to him that if he did not run, he would be rewarded with the position of Chief Assistant District Attorney, the second in command position. CR 45. Smith claims that Fazio approached his operatives with this offer.

On April 13, 1995, Fazio filed his election papers to be a Democratic candidate for the office of District Attorney for San Francisco County. CR 42. A local state senator announced Fazio's candidacy on the local news. CR 42. Smith had set up a meeting between Fazio and himself for that day, although Fazio did not know its purpose. At the meeting, Smith asked Fazio whether Fazio had made offers to Smith's confidantes not to run for District Attorney in exchange for a promotion. Fazio denied the charges. Nevertheless, Smith terminated Fazio and told him the termination was a consequence of Fazio's violation of the Election Code, a felony. CR 42. Fazio consequently filed the instant action.

During the course of this litigation, Smith conceded for purposes of summary judgment that the true reason he fired Fazio was because Fazio was running against him for District Attorney. CR 52.

B. Proceedings Below

On July 31, 1995, Fazio filed his First Amended Complaint against respondents, asserting the following claims: (1) Violation of First Amendment rights; (2) Violation of Fourteenth Amendment rights; (3) Wrongful Termination in Violation of Public Policy; (4) Slander; and (5) Intentional Infliction of Emotional Distress.

1. Opinion Of The District Court

In May of 1996, respondents filed a Motion for Summary Judgment or in the Alternative, Partial Summary Judgment on all of Fazio's claims, which Fazio opposed.

On August 30, 1996, the District Court issued an Order granting in part and denying in part respondents' motion for summary judgment. The District Court granted respondents' motion for summary judgment on Fazio's claim that his First Amendment rights were violated and that he was wrongfully terminated in violation of public policy. The District Court denied respondents' motion for summary judgment on Fazio's procedural due process claim, granted in part and denied in part his claim for intentional infliction of emotional distress, and stayed consideration of his slander claim pending further briefing. The District Court found that Fazio, by virtue of his position as Head Attorney, was a policy maker as a matter of law even though he held no supervisory or policy making role in the office. App. C at 30a-31a. On September 30, 1996, the District Court certified the Order for immediate interlocutory appeal.

2. Opinion Of The Court Of Appeal

The Ninth Circuit granted Fazio's petition to appeal in an order dated October 23, 1996. The Ninth Circuit heard oral

argument on September 17, 1997, and on October 7, 1997, filed its opinion affirming the judgment of the District Court. The Ninth Circuit held that the position of assistant district attorney is a position for which political considerations are appropriate requirements for effective performance, and thus that the termination of an at will subordinate prosecutor for challenging his superior in an election does not violate the First Amendment. App. A at 3a.

On October 21, 1997, Fazio filed a petition for rehearing en banc. On November 18, 1997, the Ninth Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

A. The *Pickering* Balancing Test Applies To The Termination of Public Employees.

The balancing test set forth by this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), which the Ninth Circuit refused to apply, is the proper test for this case. *Pickering* grew out of a series of cases from the 1950s and 1960s in which this Court invalidated statutes and actions designed to limit the rights of public employees to participate in the political process.[2]

2. *See Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding that a state cannot require its employees to swear an oath denying past (Cont'd)

In *Pickering*, a high school teacher's letter to the local newspaper which criticized the board of education's management of proposals to raise revenue for the schools was published. The board of education subsequently held a hearing at which the letter was found to be detrimental to the school district's efficient operation. The board concluded that the interests of the schools compelled his dismissal. That judgment was affirmed by the Illinois courts, which found that the interests of the schools outweighed the teacher's First Amendment rights. On appeal, this Court held that the First Amendment prohibited dismissal of a high school teacher for openly criticizing the board of education for its policies. In its decision, this Court fashioned a balancing test between:

> . . . the interests of the [employee] as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public services it provides through its employees.

Pickering v. Board of Education, 391 U.S. at 568. This Court reversed the lower court's judgment, holding that:

> absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

Id. at 574. (footnote omitted).

(Cont'd)
association with communists); *Workers v. McElroy*, 367 U.S. 886 (1961) (holding that a state cannot deny government employment based upon previous membership in a particular party); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating statutes barring employment of members of "subversive" organizations).

A narrow exception to this rule requiring the application of the balancing test in public employee termination cases was carved out in the subsequent cases of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). *Elrod v. Burns* held that non-civil service employees of a sheriff's office stated a claim for violation of their constitutional rights when they alleged they were terminated because they were not affiliated with the political party of the current sheriff. *Elrod* established that the First Amendment rights of public employees may be circumscribed by government interests only where the government employee is a "policymaker."[3] *Elrod v. Burns*, 427 U.S. at 367-368. This Court refined its definition of "policymaker" in *Branti v. Finkel* where this Court considered whether public defenders may be deemed "policymakers" within the *Elrod* exception. The court found that the issue was not whether an employee was a "policymaker," but rather whether political affiliation was an appropriate requirement for effective performance, finding that in the case of an assistant public defender, it was not. *Branti v. Finkel*, 445 U.S. at 518. In a footnote, the Court noted that it expressed no opinion on whether the same principle applied to an assistant district attorney. *Branti v. Finkel*, 445 U.S. at 518 fn. 13 ("Footnote 13").

B. This Court Applied The *Pickering* Balancing Test To The Position of Assistant District Attorney In *Connick v. Myers*.

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court specifically addressed the issue of the First Amendment rights of an assistant district attorney. In *Connick*, the District Court and the Court of Appeals used the *Pickering* balancing test to determine whether an assistant district attorney, who had

3. This court described a "policymaker" as one who "acts as an adviser or formulates plans for the implementation of broad goals." *Elrod*, 427 U.S. at 367-368.

distributed a questionnaire within the office regarding internal office matters, was wrongfully terminated for the exercise of her First Amendment rights. This Court found that the lower courts had misapplied *Pickering*, and thus erred in striking the balance in favor of the terminated employee. The Court did not discuss the *Elrod-Branti* Footnote 13 exception, but instead used the *Pickering* balancing analysis, stating:

> *Pickering*, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Connick v. Meyers, 461 U.S. at 146. (footnote omitted). This Court held that the termination did not offend the Constitution because the employee's speech "touched upon matters of public concern in only a most limited sense." *Connick*, 461 U.S. at 154.

Although this Court found that ultimately there was no Constitutional violation, it noted that the state's burden in justifying a termination varied depending upon the nature of the expression, stating "[w]e caution that a stronger showing may be necessary if the employee's speech more substantively involved matters of public concern." *Id.* at 152.

> We reiterate, however, the caveat we expressed in *Pickering*: "Because of the enormous variety of fact

> situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged."

Connick v. Myers, 461 U.S. at 154 (citations omitted). This Court thus emphasized the propriety of the use of the *Pickering* balancing test, rather than a fixed principle, in addressing the First Amendment rights of public employees.

The Ninth Circuit in this case distinguished *Connick* on the grounds that this Court only focused on whether the subject matter of the questionnaire at issue involved matters of public concern and stated that the *Connick* opinion contains no discussion on whether Assistant District Attorneys are policymakers, or whether the *Pickering* balancing test or *Elrod-Branti* exception is applicable. App. A at 10a. Fazio respectfully submits, however, that this Court's use in *Connick* of the *Pickering* balancing test rather than the *Elrod-Branti* exception demonstrates the propriety of using the *Pickering* balancing test when reviewing the termination of assistant district attorneys. It seems unlikely, given the strong interests of judicial economy and efficiency, that this Court would unnecessarily engage in the *Pickering* analysis if the case was amenable to proper and prompt disposal by application of the *Elrod-Branti* "policymaker" exception which permits summary termination regardless of the content of the speech at issue.

This Court in the *Connick* opinion also recounted the law's movement away from Justice Holmes' observation that "[a] policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" (*Connick v. Myers*, 461 U.S. at 143-144, *citing McAuliffe v. Mayor of New*

Bedford, 155 Mass. 216, 220 (1892)) to the current climate in which "there is a demonstrated interest in this country that government service should depend on meritorious performance rather than political service." *Connick v. Myers*, 461 U.S. at 149 *citing United States Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1973) and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Fazio submits that the job of assistant district attorney depends on meritorious performance rather than political service and this Court should reverse the Ninth Circuit.

C. Recent Authority Of This Court Reaffirms The Application Of The *Pickering* Balancing Test In The Instant Case.

This Court, in *O'Hare Truck Service v. City of Northlake*, __U.S. __, 116 S. Ct. 2353 (1996), reiterated that *Pickering* was the proper test to apply in cases involving adverse employment decisions based on free speech considerations, and in cases involving free speech in conjunction with political affiliation requirements.

> . . . [I]n *Branti v. Finkel*, *supra*, we reaffirmed *Elrod*'s common holding and said government termination of a public employee on account of his political affiliation brings our unconstitutional conditions cases into play . . . We also modified the standard, announced in the two opinions supporting the *Elrod* judgment, for assessing when party affiliation, consistent with the First Amendment, may be an acceptable basis for terminating a public employee: "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

> Our cases call for a different, though related, inquiry **where a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from *Pickering v. Board of Ed. of Township High School Dist. 205*,** . . . . A reasonableness analysis will also accommodate those many cases . . . **where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable.**

__ U.S. __, 116 S. Ct. at 2357-2358 (emphasis added) (citations omitted). Nevertheless, the Ninth Circuit's opinion in *Fazio* contained no mention of the *O'Hare v. City of Northlake* decision, nor of its related case, *Board of County Commissioners v. Umbehr*, __U.S. __, 116 S. Ct. 2342 (1996). The Ninth Circuit, in rendering its opinion, flatly held that the position of Assistant District Attorney was that of a "policymaker," a position where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[4] App. A at 11a. The Court of Appeals found that the job of assistant district attorney fell within the *Elrod-Branti* "policymaker" exception to the general rule prohibiting the termination of public employees for the exercise of their right to free speech. The Court of Appeals concluded that the job of assistant district attorney is a patronage position, and thus firing on the basis of political affiliation is not prohibited. App. A at 7a n.2.

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4. Respondents San Francisco and Smith were never required, at any stage in this litigation, to make such a demonstration. It is well established that the government has the burden to prove that the speech at issue is unprotected. *Speiser v. Randall*, 357 U.S. 513 (1958); *see also Freedman v. Maryland*, 380 U.S. 51 (1965).

However, the instant case is not strictly one of party affiliation, and is readily distinguishable from political patronage cases.[5] *Indeed, both Smith and Fazio ran on the Democratic ticket.* Rather, this is a case where the exercise of free speech, Fazio's decision to run against his employer, was the basis for termination.[6] Under *O'Hare v. City of Northlake*, the Ninth Circuit was required to apply the *Pickering* balancing test to determine the constitutionality of Fazio's termination. 116 S. Ct. at 2358.

Fazio submits that the instant termination was the direct consequence of his exercise of free speech, or alternately, a consequence of his exercise of free speech "intermixed with a political affiliation requirement." *O'Hare v. City of Northlake*, 116 S. Ct. at 2358. That is, Fazio's exercise of his First Amendment rights — his decision to run for office — was also a repudiation of his political association or affiliation with Smith. Under either scenario, as held by this Court in *O'Hare*, the *Pickering* balancing test must be applied. Yet no balancing occurred at either the District Court level or the Ninth Circuit. Both courts were satisfied that summary termination was appropriate despite the Constitutional issues involved.

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5. In *Elrod v. Burns*, the newly elected Democratic sheriff terminated Republican employees. Similarly, in *Branti v. Finkel*, the Democratic Public Defender terminated Republican assistant public defenders upon taking office.

6. Political speech and participation in the political process are rights ensured by the First Amendment and are at the very core of our system of government. *See Roth v. United States*, 354 U.S. 476, 484 (1957). This was emphasized in *Connick v. Myers*: "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection." 461 U.S. at 145 *citing NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

D. The Decision Of The Ninth Circuit Offends This Court's Admonition Against Fashioning Bright Line Rules In First Amendment Cases.

In addition to failing to apply the appropriate test to the circumstances in the instant case as required by the precedent of this Court, the Ninth Circuit overlooked the advisement of this Court in *O'Hare v. City of Northlake*, and *Board of County Commissioners v. Umbehr*. Both cases dealt with the termination of at-will government contracts in retaliation for exercising the right to free speech. In both opinions, this Court urged that cases involving retaliatory termination for the exercise of First Amendment require the application of the *Pickering* balancing test. In *Board of County Commissioners v. Umbehr*, this Court emphasized that *Pickering* requires "a fact sensitive determination" and cautions against the fashioning of "bright line rules" giving the government carte blanche to terminate contracts in retaliation for exercise of First Amendment rights. 116 S. Ct. at 2348-2349. In *O'Hare v. City of Northlake*, this Court stated:

> the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some *case by case adjudication* will be required even where political affiliation is the test the government has imposed.

Id. at 2358 (emphasis added).

Simply stated, "application of the nuanced *Pickering* approach is superior to a brightline rule" that permits the unilateral termination of assistant district attorneys for exercise of First Amendment rights. *See Board of County Commissioners v. Umbehr*, 116 S. Ct. at 2344. Fazio respectfully submits that the Ninth Circuit erred in applying the bright line policy making exception in the instant case.

E. The Decisions Of Other Circuit Courts That Hold Assistant District Attorneys Are Policymakers Predate And Do Not Address Tne Relevant Decisions Of This Court.

The Ninth Court relied on decisions of the Third and Seventh Circuits that held assistant district attorneys are policy makers.[7] Both *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) and *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983) explicitly hold that a prosecutor has unfettered discretion to terminate assistant district attorneys. The Court of Appeals also relied on *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977) (termination of city attorney for exercise of Constitutional rights lawful). However, these decisions pre-date *Connick*,[8] as well as *O'Hare v. City of Northlake* and *Board of County Commissioners v. Umbehr*, and therefore their continued persuasiveness is at issue. The Ninth Circuit also cited as authority *Gordon v. County of Rockland*, 110 F.3d 886 (2d Cir. 1997) (termination of assistant county attorneys, all Democrats, by newly elected Republican

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7. In *Board of County Commissioners*, in ruling that independent contractors are protected by the First Amendment, this Court rejected the holdings of the Third and Seventh Circuits that an independent contractor may have his contract with the government terminated in retaliation for his exercise of First Amendment rights. __ U.S. __, 116 S. Ct. 2342, 2346 (1996).

8. The *Connick* decision was announced on April 20, 1983. Although the *Livas* opinion was announced on July 7, 1983, it contains no discussion of *Connick* and relies instead on an earlier Seventh Circuit decision, *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir., *cert. denied*, 434 U.S. 968 1977) (holding dismissal of deputy city attorney who sought to run for Congress did not violate the Constitution). A subsequent Seventh Circuit case holding that a former Indiana Deputy Attorney General could be terminated for political affiliation, *Americanos v. Carter*, 74 F.3d 138 (7th Cir.) *cert. denied*, 116 S. Ct. 1853 (1996) cites *Livas* as authority, but also makes no mention of *Connick*.

County Attorney), *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (City Attorney terminated by newly elected Mayor). While these cases post-date *Connick*, none contain any discussion of any of the aforementioned Supreme Court precedents. Moreover, none of the cases cited by the Ninth Circuit as authority engage in the *Pickering* balancing test in addressing the termination of public employees for exercise of Constitutional rights, as repeatedly stressed by this Court.

Although this Court recognized the burden on the judiciary of engaging in the *Pickering* balancing test, it did not abandon it, stating, "[a]lthough such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Connick v. Myers*, 461 U.S. at 150. Fazio submits that the failure to engage in such an analysis, whatever the outcome, contravenes the law of this Court.

F. Under the *Fazio* Decision, Assistant District Attorneys Will Receive Lesser Constitutional Protection Than Other Government Employees.

Under recent Ninth Circuit authority, assistant district attorneys are singled out for summary termination under the "policymaker" exception. In *Rendish v. City of Tacoma*, 123 F.3d 1216, *reh. den.*, (9th Cir. 1997), a *city attorney* brought suit alleging that she was wrongfully terminated by the city of Tacoma for speaking out about discriminatory practices, in violation of her First Amendment rights. After engaging in a *factual* inquiry, the district court denied her motion for a preliminary injunction, concluding that she failed to make a sufficient showing of a likelihood of success on the merits and that she failed to demonstrate irreparable harm. Rendish appealed.

In reviewing Rendish's likelihood of success on the merits, the Ninth Circuit employed a *balancing* test in its inquiry:

> The Supreme Court has recognized that a "public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myers, (citing Pickering v. Board of Educ.)*. At the same time, the State's interest in regulating the speech of its employee differs significantly from its interest in regulating the speech of its citizenry. *Id.* To be protected by the First Amendment, a public employee's speech must involve a matter of public concern. *Id.* at 146. "If it does, then [the employee] must show that his interest in commenting upon matters of public concern outweighs any adversely affected interest of the City in promoting efficient delivery of public services." *Gillette v. Delmore* (citations omitted). *Rendish*, 123 F.3d at 1219.

In *Rendish*, the Ninth Circuit thus looked to the precedents of *Connick* and *Pickering* to weigh the First Amendment interests of the government employees, a city attorney, against the interests of the State in promoting efficiency. Similarly, the Ninth Circuit applied the *Pickering* test in *Weisbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997), to determine whether a county medical director's demotion as a result of expressing his opinion regarding his supervisor's decision making process violated his First Amendment rights.[9]

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9. The court outlined its analytical framework as follows:

> Where a government employer takes action against an employee because of the employee's speech upon matters of public concern, we balance the employee's "interest in making [his] statement against 'the interest of the State as an employer, in promoting the efficiency of the public services it performs through its

(Cont'd)

Conversely, in the *Fazio* decision, the Ninth Circuit applied the *Elrod-Branti* "policymaker" exception to the *position of assistant district attorneys*, and did not apply a balancing test. In addition, in an earlier opinion, the Ninth Circuit touched upon the issue of whether assistant district attorneys are protected by the First Amendment from disciplinary action. In *Finklestein v. Bergna*, 924 F.2d 1449 (9th Cir. 1991), *cert. denied*, 502 U.S. 818 (1991), the Court of Appeal held that a district attorney was entitled to qualified immunity because it was not clearly established in 1982 that assistant district attorneys were protected by the First Amendment from disciplinary action. *Id.* at 1453. The Court, stated, however, "[w]e hasten to add, however, that we reject the proposition that prosecutors have unfettered discretion to discipline assistant prosecutors for exercising their first amendment rights." *Finkelstein*, 924 F.2d at 1453. The *Finkelstein* court based its reasoning on *Connick v. Myers*, 461 U.S. 138 (1983) and its omission of reference to footnote 13 of *Branti v. Finkel*, 445 U.S. 507 (1980).[10] *Finkelstein*, 924 F.2d at 1453.

(Cont'd)

employees.' " *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *see also Connick*, 461 U.S. at 150-151. *Weisbuch*, 119 F.3d at 782.

10. In *Fazio v. City and County of San Francisco*, the Ninth Circuit distinguished *Finkelstein* on the grounds that Finkelstein's position was a civil service position and therefore Finkelstein had a property interest in his position, unlike Fazio. App. A. at 10a. Fazio submits that where the state seeks to regulate the speech of an employee, it is hardly relevant whether that employee is a civil servant or not, and that no justification can be given for affording civil servants greater freedom of speech than at-will government employees. Fazio further submits that the existence of a property interest in employment is relevant to a Fourteenth Amendment claim of violation of procedural Due Process, but is not relevant to a First Amendment claim.

Thus, under the *Fazio* decision, by virtue of being subject to the "policymaker" exception rather than the *Pickering* balancing test, an assistant district attorney receives less protection under the First Amendment than other government employees.

G. Under California Law District Attorneys In California Act As State Officials When Prosecuting Crimes.

In *Pitts v. County of Kern, et al.*, 98 C.D.O.S. 800 (January 30, 1998), the California Supreme Court held that California district attorneys act on behalf of the state when preparing to prosecute and prosecuting criminal violations of state law. In *Pitts*, the court addressed whether a county could be held liable for damages under 42 U.S.C. § 1983 due to the conduct of the county's "policymaking" district attorney. Based on this Court's decision in *McMillian v. Monroe County, Ala.*, __ U.S. __, 117 S. Ct. 1734 (1997), the Court held that the issue of whether a county district attorney is a policymaker for the county is one of law and that when prosecuting crimes, district attorneys represent the state, not the county.[11] The court based its reasoning on the fact that county attorneys are supervised by the State Attorney General pursuant to article V, section 13 of the California Constitution, and on pertinent sections of the California Penal Code and California Government Code and on California case law. *Pitts v. County of Kern, et al.*, at 803-805.

Rejecting Fazio's argument that he was not a policymaker in the San Francisco District Attorney's office, the Ninth Circuit stated that Fazio's powers as an assistant district attorney were "nearly identical to those of the actual District Attorney." App.

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11. The Court stated that a different conclusion might be appropriate if the issue presented was which entity the district attorney represented when hiring or firing an employee. *Pitts v. County of Kern, et al.*, 98 Daily Journal D.A.R. 1039, 1046 (January 29, 1997).

A at 12a-13a. In support of this assertion, the court noted that the district attorney and his assistants

> shall prosecute all criminal cases in the municipal or superior courts, draw all complaints, and issue warrants for the arrest of persons charged with crime who are to be prosecuted in such courts.

App. A at 12a n.4.

The Ninth Circuit thus held that when prosecuting crimes, assistant district attorneys act as policymakers for the District Attorney. Under the analysis of *Pitts*, however, assistant district attorneys, like District Attorneys, act on behalf of the state, not the county, when prosecuting crimes. Fazio submits that if assistant district attorneys are acting on behalf of the state when prosecuting crimes, political affiliation and loyalty to the District Attorney are not appropriate requirements for effective performance of their jobs. Indeed, Fazio proposes that political considerations are wholly irrelevant to the prosecution of violations of state law.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. The First Amendment Rights Of All Government Attorneys Is An Important Issue Of Constitutional Law.

Fazio submits that *Connick v. Myers* is properly read as requiring the application of the *Pickering* balancing test to the position of assistant district attorney and other governmen

attorneys. Fazio also submits that the holding of *O'Hare v. City of Northlake* requiring application of the *Pickering* balancing test "where a government employer takes adverse action on account of an employee or service provider's right of free speech" and "where specific instances of the employee's speech or expression . . . are intermixed with a political affiliation requirement" is properly applied to this case. 116 S. Ct. at 2358. Should this Court disagree on *both* counts, Fazio requests that this Court grant this petition on the grounds that an important First Amendment issue is at stake, an issue involving all assistant district attorneys. This is an important issue of Federal law involving one of the most fundamental rights in our society that must be reviewed by this Court.

B. The Restriction On The First Amendment Rights Of Assistant District Attorneys Harms The Society At Large.

Because of their experience in government, assistant district attorneys "are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *See Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 1887 (1994). Yet the decision of the Court of Appeals renders the political voices of these persons mute, as they may be terminated for the expression of any political belief that their employers find unpalatable.

This Court has always accorded greater deference to "government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 511 U.S. 661, 114 S. Ct. at 1887. Yet the instant case is one in which the restriction on the speech of the government employee results in the restriction on the speech of the public at large. As stated by this Court "[n]o right is more precious in a free country than that of having a voice in the election of those who make

the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). That right is impaired when the choice of those from which we choose is defined by those already in power. The public will ultimately be deprived of the best and most qualified candidates for public office, and public debate will be stifled as the electorate's choice will be confined to candidates who are anointed by the officials they seek to replace. James Madison thought that ought not be the case:

> Who are to be the objects of popular choice? *Every citizen whose merit may recommend him to the esteem and confidence of his country.* No qualification of wealth, of birth, of religious faith, or of *civil profession* is permitted to fetter the judgment or disappoint the inclination of the people.

The Federalist No. 57 (emphasis added). Due to the importance of the First Amendment issue at stake and its impact on our society, certiorari should be granted.

CONCLUSION

It is the province of this court to demand vigilance in the protection of the First Amendment rights of public employees. Where the curtailment of those First Amendment rights detrimentally impacts the electoral process, special vigilance is required.

Only the grant of petition for certiorari will provide that vigilance. Accordingly, petitioner Fazio respectfully requests his petition for writ of certiorari be granted.

Respectfully submitted,

NANCY L. FINEMAN
Counsel of Record
JOSEPH W. COTCHETT
ELIZABETH M. O'CALLAHAN
COTCHETT, PITRE & SIMON
Attorneys for Petitioner
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
San Francisco, California 94010
(650) 697-6000

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 7, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM FAZIO,
Plaintiff-Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO; ARLO SMITH,
Defendants-Appellees.

No. 96-16981
D.C. No. CV-95-01559-EFL
OPINION

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Argued and Submitted
September 17, 1997—San Francisco, California

Filed October 7, 1997

Before: Ruggero J. Aldisert,* Herbert Y. C. Choy, and David R. Thompson, Circuit Judges.

Opinion by Judge Choy

SUMMARY

Labor & Employment/Government Employment

The court of appeals affirmed a judgment of the district court. The court held that a district attorney's discharge of an

*The Honorable Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

at-will subordinate prosecutor for deciding to challenge his superior in an election does not violate the First Amendment.

While appellee Arlo Smith was the District Attorney of appellee City and County of San Francisco (CCSF), appellant William Fazio was "Head Attorney," a subordinate, "at-will" position. Fazio handled "high-profile" cases, and was often quoted in the media on matters of public interest and cases being handled by his office. Fazio's salary was over $100,000 per year, and he assertedly had created programs to combat drug trafficking and domestic violence.

Fazio filed papers to run against Smith in the 1995 election for District Attorney. Smith fired him.

Fazio sued CCSF and Smith for wrongful termination. One of his claims was that his firing violated the First Amendment because his position was not that of a "policymaker," but one whose duties were the same as those of any other Assistant District Attorney.

The district court granted partial summary judgment for the defendants on the First Amendment claim, and certified it for immediate appeal by Fazio.

[1] When analyzing claims by government employees asserting that they were fired because they exercised their First Amendment rights, the trial court must balance the interests of the employee as a citizen in commenting on matters of public concern, and the interests of the state as an employer in promoting the efficiency of the public services it performs through its employees. An exception to this general rule is that a public official who is a "policymaker" may be fired for political reasons without offending the Constitution.

In performing this analysis, the court should inquire into such matters as whether the speech impairs discipline or control by superiors; disrupts co-worker relations; erodes a close

working relationship premised on personal loyalty and confidentiality; interferes with the speaker's performance of duties; or obstructs routine operations.

[2] The crux of the issue was whether Fazio's position was a policymaking one. A public employee need not literally *make* policy in order to fit within the policymaker exception. Rather, an employer may fire a public employee for purely political reasons if the employer can demonstrate that political considerations are appropriate requirements for effective performance of the job. If Fazio was not a policymaker, his First Amendment claim would have been evaluated using the balancing test. On the other hand, if Fazio was a policymaker, his employment could have been terminated for purely political reasons without offending the First Amendment.

[3] A public agency would be unmanageable if its head had to retain political enemies in positions of confidence, or in which they would be exercising discretion in the implementation of policy.

[4] While Fazio's powers under the San Francisco Charter were identical to those of a rank-and-file Assistant District Attorney, they were also nearly identical to those of the District Attorney. Fazio did not point to a case directly stating that assistant district attorneys are *not* policymakers, or to a case holding that an at-will assistant district attorney is entitled to retain his job while running against his employer in an election. Moreover, Fazio was paid over $100,000 per year, commented to the media about CCSF cases and others of public interest, and handled high-profile cases with a great degree of autonomy. Smith's termination of Fazio's employment was not a violation of the First Amendment.

COUNSEL

Nancy L. Fineman and Joseph W. Cotchett, Cotchett & Pitre, San Francisco, California, for the plaintiff-appellant.

Aleeta M. Van Runkle, Deputy City Attorney, and Jonathan Holtzman, Chief Deputy City Attorney, San Francisco, California, for the defendants-appellees.

OPINION

CHOY, Circuit Judge:

Plaintiff-appellant William Fazio ("Fazio") appeals the district court's partial grant of summary judgment in favor of defendants-appellees City and County of San Francisco ("CCSF") and Arlo Smith ("Smith") (collectively, "Appellees"). Fazio, a former Assistant District Attorney for CCSF, claims that the district court erred in holding that former CCSF District Attorney Smith's termination of Fazio's employment when Fazio decided to run against Smith in an upcoming election did not violate the First Amendment as a matter of law. We have jurisdiction under 28 U.S.C. § 1292(b), and we affirm the judgment of the district court.

Factual and Procedural Background

Arlo Smith was the District Attorney of CCSF in 1995. When William Fazio, an Assistant District Attorney for San Francisco, filed his papers to run against Smith for the District Attorney position on April 13, 1995, Smith fired Fazio. At the time of his firing, Fazio had worked as a prosecutor in the San Francisco District Attorney's office for almost twenty years, had the title "Head Attorney," and worked in the Homicide Department. Fazio alleges, and Appellees concede for the purpose of this appeal, that Fazio was fired because he decided to run against Smith for the District Attorney position.

According to Fazio, the position of Head Attorney "does not have a single definition but instead may denote several things, such as an assistant district attorney's level of experi-

ence and skill, or the assistant district attorney's degree of supervisory capacity." Fazio states that he received the "Head Attorney" title due to his experience and skill as an Assistant District Attorney resulting from his lengthy service with the office. Fazio claims that the job duties of a Head Attorney are no different than those of a regular Assistant District Attorney.

As a Head Attorney in the Homicide Division, Fazio handled high profile cases. Fazio was often quoted by the media on matters of general public interest, such as the O.J. Simpson trial, as well as on matters being handled by the District Attorney's office in which he worked. As Head Attorney, Fazio's salary was over $100,000 per year. The Appellees also point out that Fazio claims to have " 'innovated a program which closed down commercial property which was used for the sale of drugs' " and " 'helped create the Domestic Violence Unit in the District Attorney's Office.' "

According to the San Francisco Charter § 3.402, the position of Assistant District Attorney is an at-will position, and no cause is required for the firing of an Assistant District Attorney. Pursuant to the Charter, the District Attorney or his assistants "shall prosecute all criminal cases in the municipal and superior courts, draw all complaints, and issue warrants for the arrest of persons charged with crime who are to be prosecuted in such courts." *Id.*

Fazio's first amended complaint states five grounds for relief: 1) violation of First Amendment rights; 2) violation of Due Process rights; 3) wrongful termination in violation of public policy; 4) slander; and 5) intentional infliction of emotional distress. CCSF and Smith moved for summary judgment on all five causes of action. The district court granted in part and denied in part the motion for summary judgment. One of the issues on which summary judgment was granted was the alleged First Amendment violation. The district court certified the First Amendment claim for immediate

appeal under 28 U.S.C. § 1292(b), and this court granted Fazio's motion for interlocutory appeal on October 23, 1996.

Standard of Review

We review a grant of summary judgment de novo. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). We must determine whether, viewing the evidence in the light most favorable to the nonmoving party, any genuine issues of material fact exist, and whether the district court correctly applied the relevant substantive law. *Id.* The district court's grant of summary judgment may be affirmed if it is supported on any ground in the record, regardless of whether the district court relied upon that ground. *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 860-61 n.17 (9th Cir. 1995).

In response to a properly supported motion for summary judgment, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The inquiry performed by the trial court is the determination of whether "any genuine factual issues [exist] that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). For an issue to be "genuine," there must be evidence such that a verdict in favor of the nonmoving party could be reached by a reasonable jury. *Id.* at 248. Therefore, a mere "scintilla" of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some "significant probative evidence tending to support the complaint." *Id.* at 252, 249.

Analysis

[1] When analyzing claims by government employees who are asserting that they were fired because they exercised their First Amendment rights, under the rule set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) the trial

court must "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[1] The Supreme Court later carved out an exception to this general rule. Under *Elrod v. Burns*, 427 U.S. 347 (1976), a public official who is a "policymaker" may be fired for political reasons without offending the United States Constitution.

The Supreme Court subsequently refined its description of the inquiry to be used in determining whether *Elrod* applies to a given employee. In *Branti v. Finkel*, 445 U.S. 507, 518 (1980), two Republican Assistant Public Defenders brought suit to enjoin the Democratic Public Defender from discharging them on the basis of their political affiliation. The Supreme Court stated that, in evaluating whether a position falls under the *Elrod* exception, the essential inquiry is "not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[2] The *Branti* Court went on to hold that the position of assistant public defender is not the type of public office in which a particular party affiliation may be a job requirement,

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[1]In performing this analysis, the court should inquire into such matters as whether the speech:

> (i) impairs discipline or control by superiors, (ii) disrupts coworker relations, (iii) erodes a close working relationship premised on personal loyalty and confidentiality, (iv) interferes with the speaker's performance of her or his duties, or (v) obstructs the routine operations of the office.

Hyland v. Wonder, 972 F.2d 1129, 1139 (9th Cir. 1992).

[2]Both *Elrod* and *Branti* are so-called "patronage" cases in which public employees were fired on the basis of their political affiliations, i.e., the employees belonged to the "wrong" political party, and their employment was terminated for that reason.

because public defenders represent individual defendants, rather than society as a whole. *Id.* at 519. Significantly, the *Branti* Court noted that the above holding was not necessarily applicable to District Attorneys: "This is in contrast to the broader responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on the grounds of political party affiliation or loyalty." *Id.* at 519 n.13. The rationale utilized to permit patronage dismissals in *Elrod* and *Branti* may also be applicable in the context of dismissals that are based on a public employee's political activities, such as running for office against an employer:

> If a public official is permitted to fire a confidential or policymaking employee merely because the latter quietly, inoffensively, undemonstratively belongs to the wrong political party . . . the official should be permitted to fire the same employee when the latter asks the electorate to throw the rascal out and put himself into the rascal's office.

Wilbur v. Mahan, 3 F.3d 214, 218 (7th Cir. 1993).[3]

[2] To summarize, a public employee's claim that he or she was fired for exercising his or her First Amendment speech rights would generally be analyzed using the *Pickering* balancing test. If, however, a public employee is a policymaker, then the claim would fall under the rubric of *Elrod* and *Branti*. Thus, the crux of the issue in the case at hand is whether Fazio's position was a policymaking one. Under the rationale in *Branti*, a public employee need not literally *make*

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[3]In *Wilbur*, deputy sheriff Wilbur announced his candidacy for the office of sheriff. The current sheriff was going to run for re-election to that position. Approximately one week after Wilbur's announcement, the sheriff placed Wilbur on unpaid leave until after the election. *Id.* at 215. The Seventh Circuit held that the sheriff's actions did not offend the First Amendment. *Id.* at 217-18.

policy in order to fit within the *Elrod* policymaker exception. Rather, an employer may fire a public employee for purely political reasons if the employer can demonstrate that political considerations are "appropriate requirement[s] for the effective performance" of the job. *Branti*, 445 U.S. at 518; *see also Wilbur*, 3 F.3d at 218. If Fazio was not a policymaker, then his First Amendment claim would be evaluated using the *Pickering* balancing test. On the other hand, if Fazio was a policymaker, then under *Branti* his government employment could be terminated for purely political reasons without offending the First Amendment.

Fazio relies primarily on two cases to support his assertion that we should evaluate his claim under the *Pickering* balancing test rather than under the *Branti* exception. First, in *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court applied the *Pickering* test to evaluate the First Amendment claim of an Assistant District Attorney whose employment was terminated because she distributed throughout the office a questionnaire concerning office policy and morale. Second, in *Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991), we held that in 1982 it was not clearly established that prosecutors were protected by the First Amendment from politically motivated disciplinary action. In so doing, we noted that in *Connick*, "Myers' position as an assistant prosecutor was unimportant to the Court's straightforward application of the general rule prohibiting the discharge of public employees for exercising their first amendment rights." *Id.* at 1453.

Fazio argues that the fact that the Supreme Court did not use *Branti* but rather used *Pickering* to evaluate assistant prosecutor Myers' claim in *Connick* is a refutation of the proposition that all Assistant District Attorneys are policymakers as a matter of law. He contends that our statement in *Finkelstein* indicates that we should use such an approach in evaluating Fazio's claim.

Fazio, however, is reading too much into these cases. The Court in *Connick* focused on whether the topics of the ques-

tionnaire were matters of public concern. *Connick*, 461 U.S. at 143. The opinion contains no discussion whatsoever about whether Assistant District Attorneys are policymakers, or whether claims of Assistant District Attorneys arguing that they were discharged for exercising their First Amendment rights should be evaluated under the *Pickering* test or the *Elrod-Branti* exception. In other words, the Supreme Court in *Connick* did not visit the issue of whether an Assistant District Attorney is a policymaker, and that the case therefore should not stand for the premise that Assistant District Attorneys are unqualifiedly not policymakers.

As for our decision in *Finkelstein*, a key fact in that case differs from the case at hand. Finkelstein's position was a civil service position, while Fazio's position was an at-will position. As a civil service employee, Finkelstein had a property interest in his job as a deputy district attorney, unlike Fazio. The *Finkelstein* panel cited with apparent approval several out-of-circuit cases that held that at-will Assistant District Attorneys could be dismissed for political reasons without offending the First Amendment. The *Finkelstein* decision mentions the *Elrod* policymaking exception and the *Branti* footnote, and also cites to *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977) (holding that the broad duties of an at-will deputy city attorney made Newcomb a policymaker for *Elrod* purposes) and *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) [discussed in more detail later in this opinion], stating that *Newcomb* and *Mummau* "turned largely on determinations that assistant prosecutors were policymaking officials, thus virtually at-will employees." *Id.*

Fazio contends that the district court erred in finding that the position of Head Attorney/Assistant District Attorney is a "policymaking" position. Fazio argues that, despite his status as Head Attorney, he was not a policymaker because his "responsibilities are no different from rank and file assistant district attorneys." Therefore, Fazio claims, the *Elrod-Branti*

exception does not apply to him, and his cause of action should be evaluated under the *Pickering* balancing test.

[3] However, as we noted earlier, the term policymaker as used in this context does not mean 'one who makes policy.' Rather, the term refers to a position in which political considerations are "appropriate requirement[s] for the effective performance of the public office involved." *Branti*, 445 U.S. at 519. Indeed, "[a] public agency would be unmanageable if its head had to . . . retain his political enemies . . . in positions of confidence or positions in which they would be . . . exercising discretion in the implementation of policy." *Wilbur*, 3 F.3d at 217. Several of our sister circuits have addressed the question of whether the position of assistant district attorney (or a like position) is a policymaking position, and, after a careful consideration of the facts, answered the question in the affirmative.

In *Mummau v. Ranck*, 687 F.2d 9, 10 (3d Cir. 1982) (per curiam), the Third Circuit affirmed a decision of the district court and held that an Assistant District Attorney fell squarely within the *Elrod-Branti* exception. In that case, Mummau claimed that he was not a policymaker because he only prosecuted juvenile cases and was not involved in the policymaking details of the office. *Mummau v. Ranck*, 531 F. Supp. 402, 404 (E.D. Pa. 1982). The district court noted that as an Assistant District Attorney, Mummau could, under Pennsylvania law, take over the duties of the District Attorney should the District Attorney become incapacitated. *Id.* at 404-05. The district court found that the powers statutorily granted to Assistant District Attorneys were very broad, regardless of whether or not the Assistant District Attorneys actually exercised those powers. *Id.* at 405. "So long as the applicable statutes, regulations and case law 'contemplate' that the public officer 'might' be relied upon to render legal advice implementing policy" the official may be fired for political reasons without offending the First Amendment. *Id.*

In *Livas v. Petka*, 711 F.2d 798, 800 (7th Cir. 1983), the Seventh Circuit held that an assistant prosecutor was a policymaker and thus could be subject to termination under *Elrod*. The court observed that prosecutors do not have individuals as clients, but rather serve "society as a whole." *Id.* The court noted that, while generally the prosecutor will be responsible for creating policy, the assistant prosecutor implements the policies set forth by the prosecutor, and "may, in carrying out his or her duties, make some decisions that will actually create policy." *Id.* at 801. The court concluded that a prosecutor's loss of confidence "for whatever reason" in an assistant prosecutor is sufficient justification for the dismissal of that assistant prosecutor. *Id. See also Gordon v. County of Rockland*, 110 F.3d 886, 890-91 (2d Cir. 1997) (" 'All circuit court decisions—and almost all other court decisions—involving attorneys in government service, other than public defenders, have held that *Elrod/Branti* do not protect these positions.' ") (quoting Susan Lorde Martin, *A Decade of Branti Decisions*, 39 Am. U. L. Rev. 11, 46-47 (1989)); *Williams v. City of River Rouge*, 909 F.2d 151, 155 (6th Cir. 1990) ("[C]ourts that have decided whether city and county attorneys are . . . protected [under the First Amendment against politically-motivated dismissal] have almost uniformly found that they are not."); *Newcomb*, 558 F.2d 825 (7th Cir. 1977) (holding that the broad duties and discretionary role of an at-will deputy city attorney made Newcomb a policymaker for *Elrod* purposes).

[4] In light of the above-cited authorities, we hold that Assistant District Attorney Fazio was a policymaker. While his powers under the San Francisco Charter are identical to those of a rank-and-file Assistant District Attorney, they are also nearly identical to those of the actual District Attorney.[4]

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[4]The District Attorney must furnish a bond and appoint all assistants and employees in the office. The District Attorney may also requisition funds from the District Attorney's special fund in certain circumstances. However, the District Attorney *or his assistants* "shall prosecute all criminal cases in the municipal or superior courts, draw all complaints, and issue warrants for the arrest of persons charged with crime who are to be prosecuted in such courts." (emphasis added).

It is true that the Supreme Court in *Connick* used the *Pickering* test; however, the Court did not address the issue of whether an Assistant District Attorney is a policymaker. Fazio does not point to a single case that directly states that Assistant District Attorneys are *not* policymakers nor has he referred us to any case in which a court has held that an at-will Assistant District Attorney is entitled to retain his or her job while running against his or her employer in an upcoming election. Moreover, Fazio was paid over $100,000 per year, commented to the media about CCSF cases and other cases of general public interest, and handled high profile cases with a great degree of autonomy.[5] A policymaking public employee has no First Amendment right to run for office against his or her superior without being subject to termination for that reason. Therefore, Smith's termination of Fazio's employment was not a violation of the First Amendment. Because we hold that Fazio's position with CCSF was a policymaking one, we do not address Fazio's claim that under the *Pickering* balancing test his interest in free speech outweighs the Appellees' interest in running an efficient office. We also need not reach Smith's claim that he is entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[6]

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[5]Some factors to be considered when determining whether a job is a policymaking position are:

> vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.

Hall v. Ford, 856 F.2d 255, 262 (D.C. Cir. 1988).

[6]Government officials are entitled to immunity from civil suit when their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1363 (9th Cir. 1994).

Appendix A

Conclusion

We hold that Fazio's job as an Assistant District Attorney was a policymaking position, and that under the *Elrod-Branti* exception Smith did not violate the First Amendment in terminating Fazio. Because Fazio was a policymaker, under the applicable law Smith could fire Fazio for a strictly political reason, namely, Fazio's candidacy against Smith in the upcoming election for the position of District Attorney. We therefore AFFIRM the district court's grant of summary judgment in favor of the Appellees.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED SEPTEMBER 30, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-95-1559 EFL

WILLIAM FAZIO,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, ARLO SMITH,

Defendants.

ORDER

By Order filed August 30, 1996, this Court granted in part and denied in part defendants' motion for summary judgment. The Court granted defendants' motion for summary judgment on plaintiff's claims that his First Amendment rights were violated, and that he was wrongfully terminated. The Court also denied defendants' motion for summary judgment on plaintiff's due process claim, and granted in part and denied in part his claim for intentional infliction of emotional distress. Finally, the Court stayed consideration of defendants' motion for summary judgment on plaintiff's slander claim pending further briefing. Oral argument on that issue was set for October 18, 1996, and later changed by the Court to October 11, 1996.

Appendix B

On September 9, 1996, plaintiff filed a motion pursuant to 28 U.S.C. § 1292 seeking certification of the Court's August 30, 1996 Order granting defendants' summary judgment motion on plaintiff's First Amendment and wrongful termination claims. On September 27, 1996, defendants filed a statement of non-opposition to plaintiff's motion, but also requested that the Court certify any order denying their motion for summary judgment on plaintiff's slander claim. Oral argument on this motion is therefore unnecessary.

Having considered plaintiff's motion, and for good cause shown, the Court HEREBY ORDERS as follows:

1. The Court's August 30, 1996 Order granting defendants' motion for summary judgment on plaintiff's First Amendment and wrongful termination claims involves controlling questions of law;

2. There are substantial grounds for differences of opinion over the ultimate determination of this litigation;

3. An immediate appeal of the Order may materially advance the ultimate determination of this litigation;

4. The August 30, 1996 Order is therefore CERTIFIED for immediate appeal pursuant to 28 U.S.C. § 1292(b);

5. The Court's consideration of the parties' supplemental briefing on defendants' motion for summary judgment on plaintiff's slander claim is STAYED until resolution of any interlocutory appeal or until further order of the Court;

6. Oral argument set for October 11, 1996 on plaintiff's motion for certification is hereby taken off calendar, and oral argument on defendants' motion for summary judgment on plaintiff's slander claim is hereby CONTINUED until further order of the Court;

7. The Court will hold a status conference in this matter on January 14, 1997 at 8:45 a.m. The parties should promptly notify the Court if the Ninth Circuit accepts this matter for interlocutory appeal, and that date will be vacated.

IT IS SO ORDERED.

DATED: September 30, 1996.

s/ Eugene F. Lynch
Eugene F. Lynch
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED AUGUST 30, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-95-1559 EFL

WILLIAM FAZIO,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, a former Assistant District Attorney for San Francisco, filed this complaint claiming that defendants City and County of San Francisco ("CCSF") and Arlo Smith ("Smith"), the former District Attorney, violated his civil rights, 42 U.S.C. § 1983, as well as committed various state law torts. The first amended complaint filed on July 31, 1995 alleges the following five causes of action: (1) violation of First Amendment rights; (2) violation of Due Process rights; (3) wrongful termination in violation of public policy; (4) slander; and (5) intentional infliction of emotional distress. Defendants

have moved for summary judgment on all five causes of action. After considering all of the papers filed in connection with this motion, as well as the oral arguments of counsel at the July 2, 1996 hearing, the Court concludes that defendants' motion is granted in part and denied in part.

II. BACKGROUND[1]

As indicated above, plaintiff is a former Assistant District Attorney for the defendant CCSF. During the period of time relevant to the present lawsuit, early 1995, defendant Smith was the District Attorney, and consequently plaintiff's ultimate supervisor. Plaintiff was a Head Attorney in the Homicide Department.[2] Under § 3.402 of the City and County of San Francisco Charter, plaintiff was an at-will employee.[3]

In early 1995, the organization of the San Francisco District Attorney's office was as follows. Defendant Smith was the

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1. Most of the facts relevant to the present motion are undisputed. However, in the instances where the parties do differ, the dispute will be noted. And of course, plaintiff's version of the facts will be accepted as true and all inferences will be drawn in the light most favorable to plaintiff for purposes of this motion. Fed. R. Civ. P. 56; *see also Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987).

2. A Head Attorney's responsibilities and duties is a matter of legal significance under the First Amendment, and therefore, not surprisingly, a matter of some dispute. For this reason, the details of the position of Head Attorney will be discussed below.

3. Section 3.402 of the City and County of San Francisco Charter states that the District Attorney, "shall appoint, and at his pleasure may remove, all assistants and employees in his office."

elected District Attorney, and as such was the head of the office. Robert Podesta, the Chief Assistant District Attorney was second in command. Next in command was the policy making group consisting of: Linda Klee, Chief of the Criminal Division; Paul Principe, Chief of the Superior Court; Paul Cummings, Chief of Municipal Court; and Thomas Norman, Chief Trial Attorney. Plaintiff's immediate supervisor was Eugene Sweeters, who was the Assistant in Charge of the Homicide Department.

Defendant Smith was up for re-election in the Fall of 1995. Early that same year, rumors circulated that plaintiff was also going to run for District Attorney. Smith alleges that he heard rumors that Fazio had offered not to run against Smith if he was promoted to position of Chief Assistant, which was then occupied by Robert Podesta. Plaintiff denies that he ever made such an offer, which the Court accepts as true for present purposes.

Everything came to a head on April 13, 1995. During the lunch hour, plaintiff filed his papers to run for District Attorney in the upcoming election. Later that same afternoon, plaintiff met with Smith and Linda Klee.[4] Smith began the meeting by confronting plaintiff with the rumors that he was offering not to run in exchange for a promotion. Plaintiff alleges that he affirmatively denied this accusation.[5] Smith then terminated plaintiff. According to the plaintiff, the reason stated at the meeting for the termination was that plaintiff had violated the

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4. Plaintiff was notified of this meeting by Smith's secretary on April 7, 1995. Plaintiff alleges that he was never informed of the meeting's subject.

5. It should be noted that Smith disputes this fact. According to Smith, plaintiff never denied this rumor.

California Election Code ("Election Code") by offering not to run in exchange for a promotion. Plaintiff further alleges that the actual reason was that plaintiff chose to run against Smith. Defendants assert that the stated and actual reason for termination was that Smith no longer had trust and confidence in plaintiff. However, for purposes of this motion, defendants concede that the actual reason for plaintiff's termination was his decision to run against Smith. Defendants' reply brief filed June 18, 1996 at 1. Accordingly, this Order will proceed under the assumption that plaintiff was fired simply because he decided to run for election against his boss.

Later that same day, the media became aware that Smith had terminated plaintiff because of the alleged violation of the Election Code. However, the details of how the media became aware that Smith was accusing plaintiff of an Election Code violation is a matter of factual dispute. Plaintiff alleges that both Smith and Linda Klee, who was acting on behalf of Smith, were the ones who first disseminated the accusation to the media. In contrast, defendants assert that plaintiff himself is the one who first informed the media that Smith had accused him of an Election Code violation.[6]

III. DISCUSSION

A. SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is appropriate where no genuine issues exists as to any material fact and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

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6. At the July 2, 1996 hearing, defendants' attorney conceded that the issue of who first disseminated the accusation was a disputed question of fact.

The moving party has the burden of establishing that there is no genuine issue of material fact. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

After the moving party makes a properly supported motion, the non-moving party has the burden of presenting specific facts showing that contradiction is possible. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir. 1978). It is not enough for the non-moving party to point to the mere allegations or denials contained in the pleadings. Instead, the non-moving party must set forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual issue for trial. The evidence must be more than a mere "scintilla" of evidence; the non-moving party must show that the trier of fact could reasonably find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Summary judgment may be granted "[i]f the evidence is merely colorable . . . or is not significantly probative." *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288 (9th Cir. 1987). In reviewing a motion for summary judgment, the Court must take the non-movant's evidence as true and all inferences are to be drawn in the light most favorable to the non-movant. *Id.* at 1289.

B. APPLICATION TO THE PRESENT CASE

Defendants have moved for summary judgment on all five of plaintiff's causes of action.[7] Each will be discussed in turn.

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7. Defendants have also moved for summary judgment on the issue of the after-acquired evidence doctrine. The Court finds this issue to contain multiple questions of fact, and therefore the motion for summary judgment on this issue is premature. Additionally, (Cont'd)

Appendix C

1. First Amendment

In count one of the first amended complaint, plaintiff asserts a 42 U.S.C. § 1983 cause of action based on his First Amendment rights. Specifically, plaintiff alleges that his First Amendment rights were violated when the defendants terminated him because he decided to run against Smith for the office of District Attorney. Defendants argue that the First Amendment does not prohibit the termination of high-level policy-making government employees for their political affiliations or activities. After having considered the extensive case law on this issue, as well as the written and oral arguments of counsel, the Court concludes that there has been no First Amendment violation as a matter of law.

a. Legal Standards

The general rule concerning the First Amendment rights of government employees who are terminated because they have exercised their right to free speech was established by *Pickering v. Board of Education,* 391 U.S. 563 (1968). In *Pickering* and its progeny, the Supreme Court established the four elements required for this type of First Amendment claim. *Hall v. Ford,* 856 F.2d 255, 258 (D.C. Cir. 1988). First, the public employee's speech must have been concerning a matter of public concern. *Id., see also Connick v. Myers,* 461 U.S. 138, 146-47 (1983). Second, the court must "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public

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(Cont'd)
because only the causes of action which are factually based on alleged defamation survive after this Order, the after-acquired evidence doctrine is probably moot.

concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Third, the employee has the burden of proving that his or her speech was "a substantial or motivating factor in [the] discharge." *Hall v. Ford*, 856 F.2d at 258 (citing *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). And finally, the government must be afforded an opportunity to establish that it would have reached the same decision even absent the protected conduct. *Id.*

In *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), the Supreme Court created an exception to the general framework that it had established in *Pickering*. Essentially, the exception is that high-level, policy-making government employees may be terminated for their political affiliation or activities without violating the First Amendment. In *Elrod*, the plaintiffs were non-civil-service employees of the sheriff's office who were fired by the newly elected Sheriff solely because of their political affiliation.[8] *Elrod*, 347 U.S. at 350-51. Although the Supreme Court held that the dismissals violated the First Amendment, the plurality opinion also noted that the government employer has a legitimate interest in ensuring that, "representative government not be undercut by tactics obstructing the implementation of policies of the new administration." *Id.* at 367. The Supreme Court went on to note that, "Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.*

In *Branti*, the Supreme Court applied the exception created

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8. This type of termination has come to be known as a patronage dismissal.

by *Elrod*. However, the analysis for determining which positions qualify for the exception was somewhat refined.

> [T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518. The *Branti* court ultimately held that assistant public defender is not the type of position which justifies a patronage dismissal. *Branti*, 445 U.S. at 519-20. Immediately after this holding the Supreme Court inserted the following footnote which is significant to the present case:

> This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty. *Cf. Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977), *cert denied*, 434 U.S. 968 (dismissal of deputy city attorney).

Id. at 519 n.13.

Although both *Elrod* and *Branti* dealt with the patronage dismissal factual situation, the exception for high-level positions extends equally to terminations which stem from political activities such as running for elected office. *See Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir. 1991); *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993). For purposes of this motion, the Court has assumed that plaintiff was terminated solely because he decided to run against Smith in the upcoming election.

Appendix C

Not surprisingly, various circuit courts have stepped in over the years to flesh out the test for determining which government positions qualify under the *Elrod-Branti* exception. First, several courts have noted that the analysis must focus on the powers and responsibilities of the office, as opposed to the powers and responsibilities actually held and exercised by the individual. *E.g.*, *Hall v. Ford*, 856 F.2d at 262; *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1936). And second, although the ultimate inquiry remains whether political affiliation or loyalty are appropriate to the position at issue, various factors have been developed to determine which positions fall under the *Elrod-Branti* exception for politically-based terminations of public employees.

> Among the relevant indicia of policy making authority are vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders. *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986) (quoting *Ecker v. Cohalan*, 542 F. Supp. 896, 901 (E.D.N.Y. 1982) and *Elrod*, 427 U.S. at 368); *see also Brown v. Trench*, 787 F.2d 167, 169-70 (3d Cir. 1986).

Hall v. Ford, 856 F.2d at 262.

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b. Application to Present Case

First, the issue of whether plaintiff's position as Assistant District Attorney/Head Attorney qualifies under the *Elrod-Branti* exception, which allows politically motivated terminations, must be decided. After examining the existing case law regarding prosecutors, as well as independently applying the established test, the Court concludes that the position of Assistant District Attorney/Head Attorney is such that political affiliation and loyalty are appropriate requirements for effective performance. *See Branti*, 445 U.S. at 518.

Several circuit courts have addressed cases involving prosecutors. In *Newcomb v. Brennan*, 558 F.2d 825, 826-27 (7th Cir. 1977), the Seventh Circuit affirmed the district court's dismissal of a complaint by a deputy city attorney who was terminated because he decided to run for Congress. After discussing the responsibilities of a deputy city attorney, the court stated that, "these facts clearly established that plaintiff's duties were of the 'broad scope' which the *Elrod* court equated with a policymaking function." *Id.* at 829.

In *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983), the Seventh Circuit was presented with a similar case from an assistant state's attorney who alleged that he was fired because he refused to support the state's attorney's bid for re-election. The *Livas* court affirmed the judgment for defendant on the following alternative bases: (1) the real motivation for the termination was that plaintiff was a disruptive force; and (2) even if the motivation was strictly political, assistant state's attorneys fall under the *Elrod-Branti* exception. *Id.* at 800. Under the second alternative ground, the *Livas* court, relying on *Newcomb*, reasoned that:

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> A public prosecutor, such as State's Attorney Petka, exercises broad public responsibilities in the performance of his duties. A prosecutor's "client" is not an individual, but society as a whole. And the prosecutor has the broad discretion to set whatever policies he or she believes necessary to protect the interest of that society.
>
> One of the problems faced by a prosecutor such as Petka, however, is that his policies are implemented by subordinates. Indeed, an Assistant State's Attorney may in carrying out his or her duties, make some decisions that will actually create policy. The public interest in the efficient administration of justice requires that decisions made by such assistant prosecutors conform with the broad objectives chosen by the prosecutor.

Id. at 800-01.

The Third Circuit has also found assistant prosecutors to all within the *Elrod-Branti* exception. In *Mummau v. Ranck*, 687 F.2d 9, 10 (3d Cir. 1982), the court held that an assistant district attorney may be terminated for purely political seasons without violating the First Amendment.

And finally, while recognizing that the Supreme Court expressed no opinion on the issue, if one were inclined to read the tea leaves from *Branti*, there is at least a slight indication that prosecutors qualify under the exception. After holding that assistant public defenders may not be terminated for political reason, the Supreme Court hastened to add that, "This is in contrast to the broader public responsibilities of an official such

as a prosecutor." *Branti*, 445 U.S. at 519 n.13. And as noted above, the Seventh and Third Circuits, the only circuit courts to have addressed the issue, have held that assistant prosecutors do qualify under the *Elrod-Branti* exception. In addition, the First Circuit has cited the cases from the Seventh and Third Circuits with approval. *Jimenez Fuentes*, 807 F.2d at 241.

Plaintiff attempts to rely on *Connick v. Myers*, 461 U.S. 138 (1983) and *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir. 1991), both of which this Court finds easily distinguishable. In *Connick*, the Supreme Court was presented with a First Amendment claim by an assistant prosecutor, however, the opinion focused on whether the subject matter of plaintiff's speech was of public or private concern. *Connick*, 461 U.S. 138. Interestingly, the opinion did not even discuss, much less decide, whether plaintiff's position as an assistant prosecutor qualifies under the *Elrod-Branti* exception.[9]

In *Finkelstein*, the Ninth Circuit was faced with a First Amendment claim by a deputy district attorney who alleged he was disciplined for exercising his First Amendment right to run for elected office. The court held that because it was not clearly established at the time that prosecutors were protected by the First Amendment from politically motivated terminations, Bergna is entitled to qualified immunity. *Finkelstein*, 924 F.2d at 1452-54. The cases of *Newcomb* and *Mummau* were discussed with apparent approval, however they were explicitly distinguished as concerning prosecutors who were at-will employees, whereas Finkelstein had civil service status. *Id.* at 1453. In the present case, plaintiff was an at-will employee.[10]

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9. The Ninth Circuit has made this same observation. *See Finkelstein*, 924 F.2d at 1453.

10. Accordingly, plaintiff is left to rely on the following dicta: (Cont')

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And finally, as noted above, an independent application of the black letter law to the facts of this case also indicates that plaintiff's position as Assistant District Attorney/Head Attorney qualifies under the *Elrod-Branti* exception. *See Hall v. Ford*, 856 F.2d at 262 (factors to determine if position qualifies under exception). First and foremost, assistant district attorneys have vague and broad responsibilities to charge and try criminal cases in the best interest of their client, the public at large.[11] *See Livas*, 711 F.2d at 800. This is especially true for head attorneys who have more autonomy and are assigned to the more important and higher profile cases. Head attorneys also receive higher pay than regular assistant district attorneys, due to their increased responsibilities and competence.[12] As for the power to control others and the authority to speak in the name of Smith, plaintiff asserts that head attorneys have no greater authority than any other assistant district attorney. Assuming this to be true, there is no significant power to control others. However, assistant district attorneys do represent the district attorney both by the actions in court and their statements to the media. Because of

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(Cont')

> We hasten to add, however, that we reject the proposition that prosecutors have unfettered discretion to discipline assistant prosecutors for exercising their first amendment rights.

Finkelstein, 924 F.2d at 1453. Under any reasonable interpretation of this language, the Court is not persuaded that it would require a different result in the present case.

11. This point also applies to the related factor of responsiveness to partisan politics and political leaders.

12. Plaintiff was making over $100,000.00 per year at the time of his termination.

their high profile cases, the public perception of head attorneys is that they occupy an elevated position within the office.

After considering all of these factors, the Court hereby finds that Assistant District Attorney/Head Attorney is a position which falls under the *Elrod-Branti* exception. In short, political affiliation and loyalty are appropriate requirements for the effective performance of plaintiff's former position. *See Branti*, 445 U.S. at 518. The First Amendment has not been violated as a matter of law.[13] Accordingly, the Court hereby ORDERS that defendants' motion for summary judgment as to plaintiff's first cause of action is GRANTED.

2. Due Process

In count two of the first amended complaint, plaintiff asserts a 42 U.S.C. § 1983 cause of action alleging a due process violation under the Fourteenth Amendment. Originally, plaintiff alleged violations of both property and liberty interests. Plaintiff initially claimed that he had a property interest in his job and his accumulated sick leave. And as for his liberty interest, plaintiff alleges that his reputation has been stigmatized by defendants' accusation that he violated the Election Code to the point where his ability to earn a living has been crippled. For the reasons stated below, this Court finds that defendants are entitled to summary judgment on plaintiff's property-based due process claim, but not on his liberty-based due process claim.

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13. Even assuming *arguendo* that a First Amendment right not to be terminated for political reasons did exist in this case it cannot be said that the right was "clearly established" at the time. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). Accordingly, defendants would probably also be entitled to summary judgment based on qualified immunity.

Appendix C

a. Property Interest

In the simplest terms, plaintiff had no property interest n his former job because he was an at-will employee. *See* City and County of San Francisco Charter § 3.402. Likewise, plaintiff had no property interest in his accrued sick leave. *See* San Francisco Civil Service Commission Rule 20. Moreover, even assuming *arguendo* that plaintiff did have a property right in his accrued sick leave, it would not rise to the level of a constitutionally protected right. *See Danese v. Knox*, 827 F. Supp. 185, 190 (S.D.N.Y. 1993); *see also Portman v. County of Santa Clara*, 995 F.2d 898, 906 (9th Cir. 1993) (did not decide issue, but noted that most courts hold that accrued sick leave is not a constitutionally protected property right.

And finally, in open court at the July 2, 1996 hearing, plaintiff's counsel conceded that the property-based due process claims were invalid. For these reasons, the Court hereby ORDERS that defendants' motion for summary judgment as to plaintiff's property-based due process claims is GRANTED.

b. Liberty Interest

Plaintiff has continued to assert that he was deprived of a liberty interest in his ability to earn a living without due process of law. Specifically, plaintiff claims that defendants' accusation that he violated the Election Code has stigmatized him to the point where his ability to earn a living has been hindered. Defendants argue that summary judgment should be granted in their favor because (1) the April 13, 1995 meeting satisfies any due process hearing requirement, (2) plaintiff is the one who disseminated the Election Code accusation to the public via the media, (3) the accusation does not rise to the level required to

violate the Constitution, and (4) qualified immunity applies. After considering all of defendants' arguments, the Court concludes that there is a genuine issue of material fact regarding plaintiff's liberty-based due process claim, and therefore it survives summary judgment.

Defendants have not established as a matter of law that the April 13, 1995 meeting between Smith, Linda Klee, and plaintiff constitutes the type of name clearing hearing envisioned by cases such as; *Board of Regents v. Roth*, 408 U.S. 564, 573 & n.12 (1972), and *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1110-01 (9th Cir. 1981). First of all, plaintiff alleges that he had no prior notice of the meeting's subject whatsoever, much less that Smith was going to accuse him of violating the Election Code. Second, the meeting occurred before the accusation, therefore it is unclear how plaintiff could be provided an effective opportunity to clear his name before it was ever tarnished.

Second, defendants argue that this claim is barred because plaintiff is the one who disseminated the accusation to the media after the April 13, 1995 hearing. *See Codd v. Velger*, 429 U.S. 624, 628 (1977) (per curiam). However, plaintiff disputes this point claiming that defendant Smith and Linda Klee, acting on Smith's behalf, are the ones who first went to the media. Accordingly, there is a genuine issue of material fact concerning who disseminated the accusation to the media, and therefore defendants are not entitled to summary judgment on this basis.

Next, defendants assert that plaintiff's allegation do not rise to the heightened level of stigma required to implicate constitutional liberty interests.

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> To implicate constitutional liberty interests, however, the reasons for dismissal must be sufficiently serious to "stigmatize" or otherwise burden the individual so that he is not able to take advantage of other employment opportunities. *Board of Regents v. Roth*, 408 U.S. at 573-74; *see Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

Bollow, 650 F.2d at 1101. The required stigma has also been described as that which, "seriously damages a person's reputation or significantly forecloses his freedom to take advantage of other employment opportunities" and "accusations of 'moral turpitude,' such as dishonesty or immorality. . . ." *Id.* (citations omitted), *see also Hyland v. Wonder* 972 F.2d 1129, 1141 (9th Cir. 1992). In the present case, plaintiff claims that defendants accused him of offering not to run in exchange for a promotion in violation of the Election Code. The Court cannot say that such an accusation does not implicate Constitutional liberty interests as a matter of law.

And finally, Smith argues that he is entitled to qualified immunity as to this liberty-based due process claim because although the law is well-established, the facts of this case are so unique that it cannot be said that a reasonable person should have known that plaintiff was entitled to a name-clearing hearing. *See Harlow*, 457 U.S. at 815-19. After considering all of the case law existing at the time, in connection with the facts of this case, the Court finds that Smith is not entitled to qualified immunity on this claim.

For these reasons, the Court hereby ORDERS that defendants' motion for summary judgment on plaintiff's liberty-based due process claims is DENIED.[14]

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14. However, even if plaintiff ultimately prevails on this cause of action, the maximum relief he would be entitled to is notice and a hearing to clear his name. *Roth*, 408 U.S. at 573 n.12; *Bollow*, 650 F.2d at 1100-01.

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3. Wrongful Termination in Violation of Public Policy

In count three of the first amended complaint, plaintiff asserts a wrongful termination claim based on a violation of public policy. Specifically, the plaintiff alleges that his politically motivated termination "violated fundamental public policy manifest in the First Amendment. . . ." First Amended complaint filed July 31, 1995 at 20. Accordingly, this cause of action rises and falls with the First Amendment claim. However, as discussed above, there has been no violation of the First Amendment in this case.

For this reason, the Court hereby ORDERS that defendants' motion for summary judgment regarding plaintiff's wrongful termination claim is GRANTED.

4. Slander

In count four of the first amended complaint, plaintiff asserts a slander cause of action based on defendants' accusation that he had violated the Election Code. Defendants have three basic arguments in support of their motion for summary judgment: (1) plaintiff is the one who publicized the statement; (2) the fair comment privilege applies; and (3) the official duty privilege under California Civil Code § 47(a) applies. After having considered all of these arguments, the Court concludes that the first two arguments do not justify summary judgment in favor of defendants on plaintiff's slander cause of action. However, additional briefing is in order regarding the official duty privilege under California Civil Code § 47(a).

First, defendants argue that because plaintiff himself publicized the alleged defamatory statement, an essential element

of a cause of action for slander is missing. However, as noted above, plaintiff asserts that either Smith or Linda Klee first publicized the accusation. Accordingly, there is a genuine issue of material fact as to whether defendants publicized the alleged defamatory statement.[15]

Second, defendants assert that they are covered by the fair comment privilege which applies to statements regarding matters of public concern. However, this privilege does not apply when a statement is made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964); *see also McCoy v. Hearst Corp.*, 42 Cal.3d 835, 859 (1986). This Court agrees that an accusation that an individual, who was a declared candidate for elected office, had violated the Election Code by offering not to run in exchange for a promotion is a matter of public concern. *See Matson v. Dvorak*, 40 Cal. App. 4th 539, 548 (1995). However, plaintiff has alleged that defendants acted with actual malice, which if proven would defeat the fair comment privilege. Consequently, summary judgment cannot be granted in favor of defendants on the basis of the fair comment privilege.

And finally, defendants argue for the official duty privilege under California Civil Code § 47(a) which states, "A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty." Under California law, California Civil Code § 47(a) is an absolute privilege that, "protects any statement made by a public official, so long as it is made (a) while exercising policy-making functions, and (b) within the scope of his official duties." *Royer v. Steinberg*, 90 Cal. App. 3d 490, 501 (1979); *see also Sanborn v. Chronicle Publishing Co.*, 18

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15. Defendants' attorney conceded this point in open court during the July 2, 1996 hearing.

Cal. 3d 406 (1976). Due to the multiplicity of issues addressed by the present motion for summary judgment, it is understandable that the parties devoted only minimal space to this issue. Regardless, the Court feels that additional briefing concerning the official duty privilege is needed.[16]

Accordingly, the Court STAYS defendants' motion for summary judgment regarding plaintiff's slander cause of action pending additional briefing. Defendants should submit a supplemental brief, not to exceed 15 pages, within 14 days of date of this Order. Plaintiff's supplemental opposition brief, also not to exceed 15 pages, must be filed 14 days after the filing of defendants' brief. And if defendants wish to reply, they may file a supplemental reply brief, not to exceed 10 pages, within 10 days of the filing of plaintiff's supplemental opposition. Oral argument will be heard on October 18, 1996 at 10:45 a.m. At this time, the Court will also conduct a status conference to set new pre-trial and trial dates.[17]

5. Intentional Infliction of Emotional Distress

In count five of the first amended complaint, plaintiff asserts a cause of action for intentional infliction of emotional distress based on both his termination and the alleged subsequent defamation. After having considered all of the arguments, this Court concludes that summary judgment in favor of defendants is appropriate only to the extent this claim is based on plaintiff's termination. Plaintiff does have a valid intentional infliction of

16. The additional briefing should not discuss the other causes of action or defendants' first two arguments under the slander cause of action which have already been addressed.

17. Any dates which are currently set are hereby vacated.

emotional distress claim to the extent it is based on the alleged defamation.

a. Termination Basis

As discussed above, plaintiff's termination for purely political reasons did not violate the First Amendment. Moreover, plaintiff was an at-will employee. Accordingly, it is unclear how the termination could be considered extreme and outrageous, which is a required element of the cause of action. *See Acorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 498-99 (1970). The Court finds that the termination was not extreme and outrageous as a matter of law.

In addition, defendants are also entitled to summary judgment because the termination-based intentional infliction of emotional distress claim is preempted by workers' compensation law. *See* California Labor Code §§ 3600 et seq. In *Livitsanos v. Superior Court*, 2 Cal. 4th 744, 754 (1992), the California Supreme Court ruled that a emotional distress claim is preempted by the exclusive remedy provisions of workers' compensation so long as "the employer's conduct neither contravenes fundamental public policy . . . nor exceeds the risks inherent in the employment relationship. . . ." As noted above, public policy has not been violated in the present case and termination is an inherent risk of employment. Therefore, to the extent plaintiff's intentional infliction of emotional distress claim is based on his termination, it is preempted by workers' compensation.

b. Defamation Basis

This cause of action is also based on the alleged defamatory statement by defendants. First, accepting plaintiff's facts as true,

the Court cannot say as a matter of law that falsely accusing your opponent in an election of a felony does not constitute extreme and outrageous conduct. And second, such an accusation is certainly not a risk which is inherent in the employment relationship. Accordingly, to the extent plaintiff's intentional infliction of emotional distress claim is based on the alleged defamation, it survives summary judgment.

c. Summary

For these reasons, the Court hereby ORDERS that defendants' motion for summary judgment regarding plaintiffs intentional infliction of emotional distress is GRANTED IN PART and DENIED IN PART.

IV. CONCLUSION

For the reasons stated above, the Court hereby ORDERS that defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. The causes of action which remain are:

(1) The 42 U.S.C. § 1983 cause of action based on the alleged deprivation of liberty without due process; and

(2) The intentional infliction of emotional distress cause of action to the extent it is based on the alleged defamation.

The Court STAYS determination of summary judgment on plaintiff's slander cause of action pending the submission of additional briefs, as detailed above.

On October 18, 1996 at 10:45 a.m., a hearing regarding the additional briefing on the slander cause of action and a status conference to set new pre-trial and trial dates will be held.

IT IS SO ORDERED.

Appendix C

DATED: August 29, 1996

s/ Eugene F. Lynch
Eugene F. Lynch
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 18, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-16981
DC# CV-92-02626-WMB

WILLIAM FAZIO,
Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, ARLO SMITH,
Defendants-Appellees.

ORDER

Before: ALDISERT, CHOY, and THOMPSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.